85-1215

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PEGGY GATES,

Petitioner,

—v.—

SAM SPINKS, HARRY MCARTHUR, ANDREW WILSON, CHARLES PHILLIPS, JUG ALLEN and PAUL MCMULLAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in its application of Wilson v. Garcia by concluding that all §1983 actions in Mississippi are governed by the state's one year statute of limitation for certain intentional torts, rather than the general six year limitation period for all other personal injury claims.

2. Whether the adoption of a state's one year limitation period for all §1983 actions is improper because it is inconsistent with the overriding federal interests embodied in the Civil Rights Act and unduly burdens the assertion of federal constitutional rights.

3. Whether the Court of Appeals erred by retroactively applying Wilson v. Garcia to bar the petitioner's claims in this case.

LIST OF THE PARTIES

The petitioner, the plaintiff-appellant below, is Mrs. PEGGY GATES. For approximately 18 years, until May 29, 1981, Mrs. Gates was a teacher in the Hattiesburg Municipal Separate School District, Hattiesburg, Mississippi.

The respondents, the defendants-appellees below, are SAM SPINKS, the Superintendent of the Hattiesburg Municipal Separate School District, who is sued in his individual and offical capacities, and HARRY McARTHUR, ANDREW WILSON, CHARLES PHILLIPS, JUG ALLEN and PAUL McMULLEN, members of the School Board of the Hattiesburg Municipal Separate School District, who are all sued in their official capacities.

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OPINIONS BELOW

The opinion of the Court of Appeals appears at 771 F.2d 916 (5th Cir. 1985). The order of the United States District Court for the Southern District of Mississippi was not reported and is reproduced in the Appendix (Pet. App. at A-1), along with the opinion of the Court of Appeals (Pet. App. at B-1), and the Court of Appeals' denial of rehearing en banc (Pet. App. at C-1).

JURISDICTION OF THIS COURT

Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1). The decision of the Fifth Circuit was entered on September 26, 1985. Petitioner's petition for rehearing and rehearing en banc was denied by the Fifth Circuit on October 22, 1985. This Petition was filed within ninety days thereof. 28 U.S.C. §2101.

STATUTORY PROVISIONS INVOLVED

The two federal statutory provisions involved are 42 U.S.C. §1983 and 42 U.S.C. §1988. Section 1983 provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, securd by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

Section 1988 provides in pertinent part:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and Title "Civil Rights", and of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish

suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein a Court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . . "

The Mississippi statutory provisions involved are Miss. Code Ann. §§15-1-29, 15-1-35 and 15-1-49.

Section 15-1-29 provides that:

> "Except as otherwise provided in the uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of action accrued, and not after, except that an action based on an unwritten contract of employment shall be commenced within one year (1) year next after the cause of action of such action accrued, and not after."

Section 15-1-35 provides that:

> "All actions for assault, assault

and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, and for libels, shall be commenced within one year next after the cause of such action accrued and not after."

Section 15-1-49 provides that:

"All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after."

STATEMENT OF THE CASE

The petitioner, Mrs. Peggy Gates, was a teacher in the Hattiesburg Municipal Separate School District ("the Hattiesburg School District"), in Hattiesburg, Mississippi. After 18 years employment, her contract with the Hattiesburg School District was not renewed for the school year 1981-1982, and she was not reemployed.

In her Complaint in this case the petitioner alleged that the respondents did not renew her teaching contract because of

their displeasure with the manner in which she excercised her constitutionally protected rights of speech and associations.[1/]

After preliminary pre-trial proceedings,[2/] respondents moved for summary judgment on the grounds that, among other things, the case was barred by the Mississippi one year statute of limitations governing actions on unwritten contracts. Miss. Code Ann. §15-1-29. The Court granted

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1/ The Complaint alleged that petitioner's contract with the Hattiesburg School District had not been renewed as a result of her activities with a Forrest County, Mississippi Grand Jury, the Professional Affairs Committee of the Hattiesburg School District and the Hattiesburg Association of Educators.

The petitioner's Complaint, which was filed in the United States District Court for the Southern District of Mississippi in December, 1982, invoked the jurisdiction of that court under 28 U.S.C. §1331. Though petitioner's Complaint alleged a cause of action under 42 U.S.C. §1981, the Fifth Circuit construed it as asserting violations of 42 U.S.C.§1983 (Pet. App. at B-2).

2/ Among other things, the respondents filed an Answer denying the operative allegations of the Complaint.

summary judgment on that ground alone.[3/]

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit. Following oral argument, this Court issued its decision in Wilson v. Garcia, 85 L.Ed.2d 254 (1985), holding that §1983 claims are governed by a state's statute of limitations for personal injury actions. In the wake of Wilson, the Fifth Circuit requested supplemental briefs from the parties herein regarding which of two Mississippi limitation periods for personal injury actions should apply.

On September 26, 1985, the Court of Appeals affirmed the district court's decision. The court held that the governing statute of limitations for all §1983 claims in Mississippi was Miss. Code Ann. §15-1-35,

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3/ The district court's order granting summary judgment in favor of the respondents is reproduced at Appendix A.

the one year, intentional tort statute of limitations, rather than the six year limitation period applicable to all other personal injury claims. Gates v. Spinks, 717 F.2d 916 (5th, Cir. 1985).[4/]

Petitioner's requests for rehearing and rehearing en banc were denied by the Fifth Circuit on October 22, 1985.[5/]

REASONS FOR GRANTING THE WRIT

This case is about certain issues left unresolved by the Court's decision in Wilson v. Garcia, 85 L.Ed.2d 254 (1985) that have occasioned confusion and conflicting decisions in the lower federal courts: which statute of limitations governs §1983 actions when a state has more than one limitation period for personal injury actions.

[4/] The Fifth Circuit decision is reproduced at Appendix B.

[5/] The Fifth Circuit Order denying these requests is reproduced at Appendix C.

In its opinion below, the Court of Appeals selected the one year limitation applicable to only certain intentional torts, rather than the six year period applicable to all other personal injury claims. (Pet. App. at B-15.) That decision, which petitioner contends was incorrect, is of critical importance not only to her but to all the people of Mississippi because it drastically restricts the extent to which the Civil Rights Act may be invoked to enforce federal constitutional rights.

This Court should review the Fifth Circuit's decision because (1) the one year limitation fails to comport with the mandate of Wilson that §1983 claims be governed by the state's limitation provision for "[g]eneral personal injury actions," 85 L.Ed.2d at 269; and (2) the one year limitation is an impermissibly short period for bringing §1983 actions and it is

inconsistent with fundamental federal interests and burdens federal constitutional rights. Burnett v. Grattan, 82 L.Ed.2d 36 (1984); Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977); Johnson v. Railway Express Agency Inc., 421 U.S. 454 (1975).

Further, petitioner submits that even if the one year period is properly invoked here, Wilson v. Garcia, supra, should not have been retroactively applied to bar petitioner's case. Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971). See also, Abbitt v. Franklin, 731 F.2d 661, 663 (10th Cir. 1984); Smalls v. Inhabitants of City of Belfast, 617 F.Supp. 1567 (D.C. Me. 1985); Winston v. Sanders, 610 F.Supp. 176 (C.D. Ill. 1985).

I. THE COURT OF APPEALS ERRED IN ITS APPLICATION OF WILSON V. GARCIA BY CONCLUDING THAT ALL §1983 ACTIONS IN MISSISSIPPI ARE GOVERNED BY THE STATE'S ONE YEAR STATUTE OF LIMITATION FOR CERTAIN INTENTIONAL TORTS, RATHER THAN THE GENERAL SIX YEAR LIMITATION PERIOD FOR ALL OTHER PERSONAL INJURY CLAIMS.

In Wilson v. Garcia, supra, the Court left unresolved the question presented in this case: when a state has two different statutes of limitations for personal injury actions -- one for general personal injury actions, and another for certain intentional tort actions -- which should be adopted as the appropriate limitations period for §1983 claims in the state? That issue did not arise in Wilson because New Mexico had only one personal injury statute of limitations.

In Wilson, this Court had to determine the most appropriate New Mexico statute of limitations for §1983 claims. New Mexico had

three different statutes of limitations that were arguably applicable: a two year "Tort Claims" provision for "[a]ctions against a governmental entity or a public employee;" a three year "personal injury" provision governing all actions "for an injury to person or reputation of any person;" and a four year "catch-all" limitation for actions otherwise unprovided for. (The three statutes are cited at Wilson v. Garcia, supra at 258-59.)

The focus of the analysis in Wilson was whether a single statute of limitations period should apply to all §1983 claims in a state and, if so, which one. After concluding that a state's personal injury limitation should exclusively govern §1983 claims, the Court then applied, without further analysis, New Mexico Stat. Ann. §37-1-8, the state's sole statute of limitations

for personal injury actions.[6/]

Because the Court provided no specific guidance in Wilson regarding how to choose the appropriate limitation when more than one statute governs personal injury actions, the lower courts have adopted differing approaches to resolving this question, leading to confusion and conflict. See e.g. Mulligan v. Hazard, No. 84-3555, slip op. (6th Cir. November 26, 1985); Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985); Hamilton v. City of Overland Park, Kansas, 730 F.2d 613 (10th Cir. 1984), cert denied, 85 L.Ed.2d 476 (1985); Mismash v. Murray City, 730 F.2d 1366 (10th Cir. 1984), cert. denied, 85 L.Ed.2d 246 (1985); Hobson v.

6/ The Wilson Court rejected the New Mexico "catch-all" limitations statute, id., at 268, as an alternative to the sole New Mexico personal injury statute. However, the Wilson Court did not consider a "catch-all" statute which, in fact, provides the limitations period for personal injury cases, as in Mississippi.

Wilson, No. 76-1326 (D.C.D.C. December 16, 1985); Shorters v. City of Chicago, 617 F.Supp. 661 (N.D. Ill. 1985); Small v. Inhabitants of the City of Belfast, supra, Cook v. City of Minneapolis, 617 F.Supp. 461 (D. Minn. 1985).

For example, in this case below, the court selected the limitation statute governing certain intentional torts, and rejected the longer limitation applicable to all other torts. The Court reached that conclusion through an historical analysis, concluding that §1983 was enacted, principally, to address intentional wrongs and therefore the state's intentional tort statute was most analogous.

> "Most 1983 claims are predicated on intentional rather than negligent acts. Also . . . 1983 was enacted for the purpose of redressing injuries from intentional misconduct. It follows that the 1983 action is more analogous to intentional torts governed by the one-year prescriptive period . . . and we conclude that all section

> 1983 actions filed in Mississippi are governed by the statute." Pet. App. at B-15.

In contrast, however, other courts have reached just the opposite conclusion. In Hobson v Wilson, supra, and Shorters v City of Chicago, supra, the courts both declined to apply the shorter limitation applicable to certain intentional torts, and relied instead on the longer period governing all other personal injury claims. These courts acknowledged the historical predicate of §1983 (which the Fifth Circuit in this case took to be the sole determining consideration), but recognized that because §1983 applies to a wide range of negligent and intentional consititutional wrongs, the state's general personal injury limitation period is most analogous and should be applied. Thus, in Shorters, the court selected Illinois' five year "catch-all" provision over a two year provision for

certain intentional torts, concluding:

> "What all of this means, of course, is that the scope of Section 1983 is not at all limited to the whippings, lynchings and worse that were the 'specific historical catalyst' for its 1871 enactment. Such direct physical injury does not mark the outer bounderies of Section 1983 claims. Wilson plainly teaches its references for 'personal injury' and 'injuries to personal rights' encompasses not only such injuries (of which the sheriff's racially motivated total beating of prisoners in the seminal case of Screws v. United States, 325 U.S. 91, 65 S. Ct. 1031, 89 L.Ed. 1495 (1955) is the archtype) but also the far wider range of harms that this and other federal courts regularly treat within Section 1983 litigation." Id. at 664.

Plaintiff submits that this conflict -- between chosing a state's intentional tort or general personal injury statute of limitations for §1983 claims -- was improperly decided by the Fifth Circuit in this case. The intentional tort analysis too narrowly construes the history and scope of §1983, and conflicts with long-established precedent of this Court regarding the

elements of a §1983 claim. See e.g., Wilson, supra; Parratt v. Taylor, 451 U.S. 527 (1981); Monroe v. Pape, 365 U.S. 167 (1961); see also, Screws v. Uninted States, 325 U.S. 91 (1945). Therefore, the decision below should be reversed with instructions for implementing Wilson when a state has more than one personal injury statute of limitations.

In Wilson, §1983 claims were collectively described by this Court as "involving claims for personal injuries" and "[g]eneral personal injury actions, sounding in tort." 85 L.Ed.2d, at 269. Further, Justice Stevens, writing for the majority in Wilson, stated that §1983 "conferr[ed] a general remedy for injuries to personal rights." Id. at 268. The limitations provision in Mississippi that best fits these characterizations of §1983 is Miss. Code Ann. §15-1-49, the general limitation applicable

to all personal injury claims other than those specific intentional torts covered by Miss. Code Ann. §15-1-35.

First, Mississippi itself does not consider the intentional tort limitation statute as applicable to general personal injury cases. In a long line of decisions stretching as far back as 1891, Mississippi courts have recognized that the statute of limitations provision applicable only to intentional torts, such as Miss. Code Ann. §15-1-35, is inapplicable to a suit for personal injuries. Nelson v. James, 435 S.2d 1189, 1191 (Miss. 1983); Ford Motor Company v. Broadway, 374 S.2d 207 (Miss. 1979); Bell v. Kansas City M & B Co., 68 Miss. 19 (1891). Further, Mississippi courts have continually and consistently held that Miss. Code Ann. §15-1-35 (and its predecessors) only established the limitation period for the specific intentional torts named therein,

and no other torts, intentional or not. Southern Land and Resources Co., Inc. v. Dobbs, 467 So.2d 652 (Miss. 1985); Dennis v. Travelers Insurance Co., 234 So.2d 624 (Miss. 1970) Bush v. City of Laurel, 234 Miss. 93, 105 So.2d 562 (1958)

Second, although the Fifth Circuit was correct that the "historical catalyst for the Civil Rights Act of 1871 was the campaign of violence" by the Klan, Pet. App at B-13, that history only begins the analysis. Neither Wilson nor any other decision of this Court has ever held that the language or legislative history of §1983 limited its coverage to intentional wrongdoing. Indeed, in Parratt, this Court stated that "[n]othing in the language of 1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights." Parratt v. Taylor, 451 U.S. at 534.

Moreover, from the language and legislative history of §1983, this Court has distilled only two elements that are essential to the establishment of a cause of action under the statute.[7] Clearly, no state-of-mind element is required either by the words of the statute or any historical gloss. As this Court explained in its seminal decision in Monroe v. Pape, supra at 187, one of the critical distinctions between §1983 and its criminal counterpart, 18 U.S.C.

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[7] In Parratt, the Court articulated the elements of a §1983 claim as follows:

> "(1) whether the conduct complained of was committed by a person acting under color of state law; and
>
> "(2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." 451 U.S. at 535.

§242,[8/] is that the latter only reaches "willful" conduct, whereas §1983 is not an intentional-act statute.

Thus, because it too narrowly construes the history and scope of §1983, petitioner submits that the Fifth Circuit erred by applying the intentional tort limitation period, that the Fifth Circuit should have applied the limitation period that governs all other personal injury cases generally, and that this is an issue deserving of Supreme Court review at this time.

[8/] 18 U.S. C. §242 provides:

"Deprivation of rights under color of law.

"Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years

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II. THE SELECTION OF A STATE'S ONE YEAR LIMITATION PERIOD FOR ALL §1983 CLAIMS IS IMPROPER BECAUSE IT IS INCONSISTENT WITH THE OVERRIDING FEDERAL INTERESTS EMBODIED IN THE CIVIL RIGHTS ACT AND UNDULY BURDENS THE ASSERTION OF FEDERAL CONSTITUTIONAL RIGHTS

Even if this Court were to conclude that §1983 claims could be governed by an intentional tort limitation period, it would nonetheless be improper to adopt Miss. Code Ann. §15-1-35 in this case, because its short, one year period improperly burdens the excercise of federal rights.

As this Court recognized in Wilson, §1983 is governed by a state statute of limitation because of the operation of 42 U.S.C. §1988. 85 L.Ed.2d at 260-61. However, Wilson also emphasized that §1988 requires courts to "apply state law only if

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or for life." (Emphasis added.)

it is not 'inconsistent with the Constitution and laws of the United States.'" Id. at 261, quoting Burnett v. Grattan, supra at 43 and 42 U.S.C. §1988. This restriction on the adoption of state limitations law is necessary because "[s]tate legislatures do not devise their limitations periods with national interests in mind, and it is the duty of federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." Occidental Life Insurance Co. v. EEOC, supra at 367.

Petitioner submits that a one year limitation period for all §1983 claims would constitute just such a burden on the assertion of federal constitutional rights and thereby frustrate the implementation of the important federal interests embodied in

§1983.[9/]

One year is simply too short a period in which to expect persons victimized by official misconduct actionable under §1983 to take all the steps necessary to prepare to file their case. When choosing an appropriate state statute of limitations, a court must select one that is "sufficiently

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[9/] In a series of cases extending back to Monroe v.Pape, supra, this Court has identified the many important policies that underlie the Civil Rights Act of 1871. Summarizing these cases in Wilson this Court stated:

> "[I]t is useful to recall that §1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' Mitchum v. Foster, 407 U.S. 255, 239 (1972). The high purposes of this unique remedy make it appropriate to accord the statute 'a sweep as broad as its language.' Because the §1983 remedy is one that can 'override certain kinds of state laws,' Monroe v. Pape, 365 U.S. 167, 173 (1961) and is, in all events, 'supplementary to any remedy any State might have,' McNesse v. Board of Education, 373 U.S. 668, 672 (1963), it can have no precise counterpart in state law. Monroe v. Pape, 365 U.S. at 196, n. 5 (Harlan, J. concurring)." 85 L.Ed.2d at 264 (footnotes omitted).

See also Burnett v. Grattan, supra at 44-45.

generous in the time periods to preserve the remedial spirit of federal civil rights actions." Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977). As this Court recognized in Burnett, holding that claims under 42 U.S.C. §§1981, 1983 and 1985 could not be governed by a state's six month limitation period:

> "Litigating a civil claim requires considerable preparation. An injured person must recognize the constitutional dimensions of his injury. He must obtain counsel or prepare to proceed pro se. He must conduct enough investigation to draft pleadings that meet the requirements of federal rules; he must also establish the amount of his damages, prepare legal documents, pay a substantial filing fee or prepare additional papers to support a request to proceed in forma pauperis, and file his complaint. . . . He must be prepared to withstand various responses, such as a motion to dismiss, as well as to undertake additional discovery." Id. at 45.

Several lower federal courts that have explicitly considered the question of whether a one year period is an approppriate time

period for federal civil rights actions have concluded that it is not. See .e.g. Hobson v. Wilson, supra; Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978); Van Horn v. Lukhard, 392 F.Supp. 384 (D.C. Va. 1975).

In Van Horn, supra, for example, the court concluded that a Virginia one year statute of limitations for all §1983 claims was unconstitutional:

> "Given the policies which underly the Civil Rights Act of 1871, the Court concludes that Virginia's one year §1983 statute of limitations impermissibly 'emasculates' and 'shrivels' the broad, comprehensive and remedial protections envisioned by that Act. Requiring civil rights plaintiffs to assert their claims within one year, or else lose all prospect of vindication, defeats and vitiates the congressional purpose in enacting a right of action which has been variously described as comprehensive, remedial, overflowing, broad sweeping, expansive, and more important than corresponding state tort rights of action." Id. at 390.

Thus, for the foregoing reasons, petitioner submits that a one year statute of

limitation is impermissibly short, particularly where the Court has an equally viable alternative limitation period available that better comports with the important federal interests at stake.

III. THE COURT OF APPEALS ERRED IN RETROACTIVELY APPLYING WILSON V. GARCIA TO BAR PETITIONER'S CASE

Even if Wilson required adoption of the one year intentional tort statute of limitations for §1983 actions in Mississippi, Wilson should not have been retroactively applied in this case. Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971).

In Chevron, this Court articulated a three part test to determine whether a new statute of limitations decision should be given retroactive application.

First, a decision should not be applied retroactively if it establishes a new principle of law, "either by overruling clear

past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . " Id. at 106-107. There is no question that this Court's decision in Wilson announced a new principle of law. In Wilson, this Court, for the first time, held that all §1983 claims were to be governed by one state statute of limitations applicable to personal injury actions. In so holding, as the Fifth Circuit recognized in its opinion below, this Court effectively overruled the many cases in the Fifth Circuit (and other Circuits) applying the state limitations period applicable to causes of action most analogous to the particular §1983 claim involved. See, e.g., Pet. App at B-6; Small v. Inhabitants of the City of Belfast,

supra at 1575.[10/]

Further, prior to this Court's decision in Wilson, and at the time this case was commenced, the leading Circuit precedent on the appropriate statute of limitations for §1983 claims was Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976). There, the Fifth Circuit concluded that the one year intentional tort limitation period, Miss. Code Ann. §15-1-35, did not apply to a §1983 action, and the court applied, instead, the six year limitation period governing an action against a public official for breach of official duties. Miss. Code Ann. §15-1-49. Shaw was reaffirmed by the Fifth Circuit in Morrell v. City of Picayune, 690 F.2d 469 (5th Cir. 1981), which also rejected the one year limitation period and applied the six

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10/ As Justice O'Connor noted in her dissenting opinion, "[t]he rule that a federal court adjudicating rights under §1983 will adopt the state statute of limitations of the most closely analogous state law claim traces its lineage" back to 1830. 85 L.Ed.2d at 269.

year statute of limitations in a §1983 case. Thus, clearly, Wilson changed precisely that limitations law upon which petitioner reasonably relied.

The second Chevron factor requires a court to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Id. at 106-107. This Court's decision in Wilson had several purposes. Most importantly, it was designed to further the "federal interests in uniformity, certainty, and the minimization of unnecessary litigation . . . " Wilson v. Garcia, surpa at 266. The adoption of a personal injury limitations period, rather than the other possible choices, 85 L.Ed.2d at 267-68, also minimized the risks that states would adopt a discriminatorily short period of limitation. Id. None of these purposes will be retarded by not

retroactively applying Wilson to the instant case. Small v. Inhabitants of the City of Belfast, supra at 1577.

Lastly, Chevron requires a Court to weigh "the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.'" Id. at 107. Petitioner commenced this case on December 1, 1982 in reliance on two prior decisions of the Fifth Circuit holding that the six year limitation period, Miss. Code Ann. §15-1-49, was applicable to her claims. To prevent her from having her day in court on the eve of trial and after substantial discovery has been undertaken would obviously produce "substantial inequitable results."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decision of the Fifth Circuit reversed.

Dated: New York, NY
January, 1986

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

MRS. PEGGY GATES

PLAINTIFF

versus CIVIL ACTION NO. H82-0209(N)

DR. SAM SPINKS, ET AL.

DEFENDANTS

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS DAY this cause came on to be heard on motion of the Defendants for summary judgment and the Court, having considered the motion, with affidavit attached thereto, and the response of the Plaintiff and the court file in this cause, together with authorities, and argument of counsel, does find as follows:

I.

That this action was filed on December 1, 1982, more than one year after the alleged cause of action arose.

II.

That the applicable statute of limitations to this cause of action is Miss. Code Ann. §15-1-29 (1972), which provides for a one-year limitation.

III.

That the complaint was filed in this action over one year after the alleged cause of action arose and, therefore, based on Miss. Code Ann. §15-1-29 (1972) and White v. United Parcel Service, 629 F.2d 1 (5th Cir., 1982) and Breland v. Board of Education of Perry County, ___F.2d___ (5th Cir., No. 83-4599, Summary Calendar, April 12, 1984), this cause is barred by the applicable statute of limitations and should be dismissed.

IT IS, THEREFORE, ORDERED that the said motion be and the same is hereby granted, and that judgment be entered herein in the Defendants' favor dismissing the action with costs assessed to the Plaintiff.

SO ORDERED on this, the 16th day of August, A.D., 1984.

s/Walter L. Nixon, Jr.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-4605

MRS. PEGGY GATES,

Plaintiff-Appellant,

versus

DR. SAM SPINKS, ET. AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

W. Eugene Davis, Circuit Judge:

This appeal requires that we determine the prescriptive period which applies to actions brought in the State of Mississippi under 42 U.S.C. §1983. Guided by the recent decision of the Supreme Court in Wilson v. Garcia, ___U.S.___, 105 S.Ct. 1938, 85

L.Ed.2d 254 (1985), we conclude that the one-year period provided by Miss. Code Ann. §15-1-35 governs such actions. Because plaintiff's suit was not filed within one year from the accrual of the cause of action, we affirm the district court's summary judgment in favor of the defendants.

I.

Mrs. Peggy Gates brought this action under 42 U.S.C. §1983 against various officials of the Hattiesburg Municipal Separate School District alleging that she was discharged from her position as a teacher in retribution for her exercise of rights protected by the first amendment.[1/] The defendants moved for summary judgment asserting that Mrs. Gates' claim was not

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[1/] Although Mrs. Gates formally denominated her complaint as being brought pursuant to "Title 42, U.S.C., Section 1981, et seq.", the substance of the complaint states a cause of action only under section 1983. We therefore treat Mrs. Gates' claim as one brought pursuant to §1983.

timely brought within the one-year period provided by Miss. Code Ann. §15-1-29 (1976) for actions on unwritten contracts. The district court, relying on binding circuit authority--White v. United Parcel Service, 692 F.2d 1 (5th Cir. 1982), and Breland v. Board of Education, 729 F.2d 360 (5th Cir. 1984)--granted defendants' motion. On appeal, Mrs. Gates in brief and oral argument contended that her claim was governed by the six-year period provided by Mississippi Code Annotated §15-1-49 (1972).[2/] The Supreme Court announced its decision in Wilson v. Garcia after we heard oral argument in this case. We deferred deciding this case until the parties filed supplemental briefs on which Mississippi limitation period should be selected in light of Wilson.

[2/] Section 15-1-49. Limitations applicable to actions not otherwise specifically provided for.

All actions for which no other period of limitation is prescribed shall be commenced within six years next after the cause of such action accrued, and not after.

II.

The Reconstruction civil Rights Acts, 42 U.S.C. §§1981-1988, set no time limitation on the cause of action created by section 1983. Burnett v. Grattan, ___U.S.___, 104 S. Ct. at 2924, 2929, 82 L.Ed.2d 36 (1984). Congress instead allowed the courts to fill this statutory void.[3/] Id. 104 S.Ct. at 2928. Our responsibility in applying section

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[3/] Section 1988 provides in relevant part:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause...

1988 has been described by the Supreme Court in these terms:

> First, courts are to look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." [42 U.S.C. §1988]. If no suitable federal rule exists, courts undertake the second step by considering application of state "common law, as modified and changed by the constitution and statutes" of the forum state. Ibid. A third step asserts the predominance of the federal interest; courts are to apply state law only if it is not "inconsistent with the Constitution and laws of the United States." Ibid.

104 S. Ct. at 2928-29.

In selecting a state limitation period to apply to a 1983 action, the Court has instructed us to adopt the most "appropriate" state limitation period or the limitation governing an "analogous" state cause of action. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462, 95 S.Ct 1716, 44 L.Ed.2d 295 (1975); Board of Regents v. Tomanio, 446 U.S. 478, 483-84, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980).

Before Wilson was announced, we interpreted section 1988 as requiring us to select the state limitation period applicable to the state cause of action most analogous to the particular 1983 action filed. See, e.g., Beard v. Stephens, 372 F.2d 685, 688 (5th Cir. 1967); Shaw v. McCorkle, 537 F.2d 1289, 1292-93 (5th Cir. 1976); McMillian v. City of Rockmart, 653 F.2d 907, 909 (5th Cir. 1981). The criteria used to select an appropriate state statute of limitations varied from circuit to circuit[4/] and the Supreme Court granted certiorari Wilson v. Garcia to resolve this conflict.

In Wilson, the Court proposed to answer the following questions:

> We must first consider whether state law or federal law governs the characterization of a §1983 claim for

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4/ See the collection of cases in the en banc opinion of the Tenth Circuit Court of Appeals in Garcia v. wilson, 731 F.2d 640, 643-648 (10th Cir. 1984) (en banc).

> statute of limitations purposes. If federal law applies, we must next decide whether all §1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case... Finally, we must characterize the essence of the claim in the pending case, and decide which state statute provides the most appropriate limiting principal.

105 S.Ct. at 1943.

The Court determined first that federal law governed the characterization of a section 1983 claim for purposes of selecting a statute of limitations. Id. at 1944. In response to the second question posed, the Court held that the one most appropriate statute of limitations in each state should be selected for all 1983 claims. Id. at 1947. The Court then turned to the selection of the single New Mexico statute to be applied in the case under consideration as well as all future 1983 actions filed in New Mexico.

In selecting the single applicable New Mexico statute, the first step in the Wilson Court's analysis was to consider what general state remedy was most analogous to the 1983 action. Based primarily on the legislative history, the Court acknowledged that the dominant reason for enacting section 1983 was to provide a remedy against state and local officials who conspired with members of the Ku Klux Klan and similar terrorist groups to kill, injure and intimidate innocent citizens. Id. at 1947. For this reason, the Court agreed with the court of appeals that claims to redress these atrocities sounded in tort and the 1983 remedy was most analogous to the tort claim for personal injuries. Id. at 1948. Wilson does not direct us to choose a statute governing a particular type tort; instead it instructs us to select a statute that governs "a general remedy for injuries to personal rights." Id.

After deciding that the state statute governing the general tort remedy for personal injuries should apply to 1983 actions, it was a relatively simple task under the New Mexico statutory scheme to select the appropriate statute; a single New Mexico statute of limitations applied to "injury to the person or reputation of any person", N.M.Stat.Ann. §37-1-8 (1978). See id. at 1949. Today the problem we face is: when two different limitations periods are provided by a state for different types of personal injury actions, which limitation period govern a section 1983 action?

III.

We must choose one of two Mississippi prescriptive statutes which govern different types of personal injury claim.[5/] Miss. Code

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[5/] Mississippi has special limitations which govern particular actions such as medical malpractice. See e.g., Miss. Code Ann. §15-1-36 (1983). These special (cont'd next page)

Ann. §15-1-35 (1972), provides a one-year limitation on actions based on most, if not all common law intentional torts,[6/] Miss. Code §15-1-49 (1972), allows six years to sue on all causes of action not otherwise provided for. This residual statute governs most unintentional tort actions including negligence actions and most strict liability actions. As the residual statute it also governs many actions based on theories other than tort.

The Eleventh Circuit was recently faced with a similar problem in Jones v. Preuit and

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statutes are irrelevant for our purposes.

6/ At the time Mrs. Gates filed suit, this statute read:

> 15-1-35. Limitations applicable to actions for certain torts.
>
> All actions for assault, assault and battery, maiming, false imprisonment, malicious arrest, or menace, and all actions for slanderous words concerning the person or title, and for libels, shall be commenced within one year next after the cause of such action accrued, and not after.

Mauldin, 763 F.2d 1250 (11th Cir. 1985). The court in Jones was required to select an appropriate Alabama limitations statute for 1983 suits under the teaching of Wilson. In Alabama a six-year limitation period governs the category of suits included in the common law action of trespass. This includes actions predicated on an "intentional act done with force and immediately injurious to the person of another or to property in his or her possession." Id. at 1254. A one-year limitation period applied to all other non-contract personal injury actions. This statute governed actions which could be brought as a trespass on the case including actions predicated on a negligence theory and other non-intentional torts. Id. The court concluded, based upon the legislative history of section 1983, that "the 42nd Congress considered direct acts of violence against black citizens to be the paradigmatic wrong

addressed by the new statute. Hence, the essential nature of a Section 1983 claim fits the description of trespass under Alabama law." Id. at 1256. Accordingly, the Eleventh Circuit adopted the six-year limitations period which applied to intentional wrongs actionable as a common law trespass action. Id.

We agree with the court's analysis in Jones. Mississippi, like Alabama, provides no general prescriptive statute that governs all tort actions for personal injuries. We must choose between a statute governing intentional torts on the one hand and a statute governing negligence and strict liability actions on the other. We agree with the Eleventh Circuit that it is appropriate in choosing the state statute most analogous to 1983 that we consider the dominant purpose of Congress in enacting 1983. There is no room for disagreement with

the Eleventh Circuit that "[t]he paradigmatic personal injuries covered by the statute, those that motivated the Congress to take action, were acts of intentional and direct violence on the part of the Ku Klux Klan." Id. at 1255. This was expressly recognized by the Court in Wilson when it noted that the specific historical catalyst for 1983 was the "campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." 105 S.Ct. at 1947.

We have considered the argument that Wilson directs selection of a time limitation for a general remedy rather than a particular remedy and because the Mississippi one-year statute of limitations, section 15-1-49, has more general application, it should apply.[7/]

[7/] Five en banc opinions of the Tenth Circuit handed down the same day as its opinion in Wilson v. Garcia, seem to support this view. See Mismash v. Murray City, 730 F.2d 1366, 1367 (10th Cir. 1984) (en banc) (Utah law), cert. denied, ___U.S.___, 105 S.Ct. 2111, (cont'd next page)

The six-year statute (section 15-1-49 is more general in the sense that it is a general residual statute that applies to a broad class of actions--tort, contract or statutory--not otherwise provided for. With respect to tort personal injury actions, however, the six-year residual statute has no more general application than the one-year statute so we are relegated to making the selection on some other basis. The other criteria we find helpful in making this selection are the Court's instructions in Johnson v. Railway Express Agency, Inc., and Board of Regents v. Tomanio, that we adopt the most "appropriate" state limitation

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85 L.Ed.2d 476 (1985); Cowdrey v. City of Eastborough Kansas, 730 F.2d 1376, 1378 (10th cir. 1984) (en banc) (Kansas law); Hamilton v. City of Overland Park, Kansas, 730 F.2d 613, 614 (10th cit. 1984) (en banc) (Kansas law), cert. denied, ___U.S.___, 105 S.CT. 2111, 85 L.Ed.2d 476 (1985); and Pike v. City of Mission, Kansas, 731 F.2d 655, 658 (10th Cit. 1984) (en banc) (Kansas law); McKay v. Hammock, 730 F.2d 1367, 1370 (10th Cir. 1984) (en banc) (Colorado law).

period or the limitation governing the most "analogous" state cause of action. Most 1983 actions are predicated on intentional rather than negligent acts. Also, as stated above, 1983 was enacted for the purpose of redressing injuries from intentional misconduct. It follows that the 1983 action is more analogous to intentional torts governed by the one-year prescriptive period provided by Miss. Code Ann. 15-1-35 and we conclude that all section 1983 actions filed in Mississippi are governed by that statute. Because plaintiff concedes that her suit was not filed within one year of the accrual of her cause of action, her claim is time barred. The entry of summary judgment for defendants is therefore

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

84-4605

MRS. PEGGY GATES,

Plaintiff-Appellant,

versus

DR. SAM SPINKS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 26, 5 Cir., 1985, F. 2d)

(October 22, 1985)

Before WISDOM, GARWOOD and DAVIS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not

having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

s/W. Eugene Davis

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(2)

No. 85-1215

Supreme Court, U.S.
FILED
FEB 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PEGGY GATES

Petitioner,

versus

SAM SPINKS, HARRY McARTHUR,
ANDREW WILSON, CHARLES PHILLIPS,
JUG ALLEN and PAUL McMULLAN

Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On April 3, 1981, the Petitioner, a contract teacher for the Hattiesburg Municipal Separate School District [hereinafter referred to as School District], was given notice that her principal had not recommended her for reemployment for the 1981-82 school year. Her employment with the School District ended on May 29, 1981. In accordance with the Mississippi Employment Procedures Act (*Miss. Code Ann.* §37-9-101, et seq. (Supp. 1980)), the Petitioner requested a hearing and the School District, through its Board of Trustees, after the hearing, on September 3, 1981, approved, upheld and affirmed the initial administrative recommendation not to reemploy the Petitioner.

The Forrest County Chancery Court reversed the decision of the Board of Trustees, but on December 12, 1984, the Mississippi Supreme Court reversed the decision of the Forrest County Chancery Court and rendered a decision in favor of the Board of Trustees, reinstating its September 3, 1981, decision not to reemploy the Petitioner.

On December 1, 1982, some 20 months after the initial notification of non-renewal of her contract, and 15 months after the Board of Trustees' decision upholding the administrative decision not to renew, the Petitioner filed this 42 U.S.C. §1983 action in the United States District Court for the Southern District of Mississippi against the Board of Trustees and the School District's superintendent. Her suit alleged that her contract was not renewed as a result of a violation of her constitutional rights by the defendants.

The Respondents filed a Motion for Summary Judgment on the ground that the case was barred by *Miss. Code Ann.* §15-1-29 (Supp. 1985), a one-year statute of limitations governing, among other things, contracts of employment. The Petitioner filed a response but no supporting affidavits, and the district court granted the respondents' motion.

The Petitioner then appealed the United States Court of Appeals for the Fifth Circuit. After oral argument, but before the Court of Appeals had rendered an opinion, this Court issued its decision in *Wilson v. Garcia*, 85 L.Ed.2d 254 (1985). The Fifth Circuit requested supplemental briefs from the parties regarding which of *two* Mississippi limitation periods for personal injury should apply in light of *Wilson*.

On September 26, 1985, the Court of Appeals affirmed the District Court's decision holding that *Miss. Code Ann.* §15-1-35 (Supp. 1985) was the governing statute of limitations for all §1983 claims in Mississippi. *Gates v. Spinks*, 717 F.2d 916 (5th Cir. 1985).

The Petitioner's Request for Rehearing and Rehearing *En Banc* were denied by the Fifth Circuit on October 22, 1985.

SUMMARY OF THE ARGUMENT

In *Wilson v. Garcia*, 85 L.Ed.2d 254 (1985), this Court did not address the question of *which* personal injury statute would apply in § 1983 cases when a state has two (or more) statutes that deal with personal injuries.

The *Wilson* decision did, however, give strong enough guidance for the Fifth, Sixth and Eleventh Circuit Courts of Appeal to choose a statute dealing with *intentional* torts over a statute governing *negligence-based* or *strict liability-based* torts. Using the Court's reasoning in *Wilson*, the Sixth Circuit in *Mulligan v. Hazard*, No. 84-3555, slip op. (6th Cir. Nov. 26, 1985) adopted Ohio's one-year statute of limitations dealing with most intentional torts instead of a two-Year "catch-all" statute. The Eleventh Circuit used the same reasoning, citing the Civil Rights Acts' "historical context" in applying the Alabama six-year statute governing intentional torts rather than a one-year residual statute. *Jones v. Preuit and Mauldin*, 736 F.2d 1250 (11th Cir. 1985). To the Respondents' knowledge, no other Courts of Appeal have addressed the issue other than these two courts and the Fifth Circuit in the case at bar.

Although this in *Wilson* and the Courts of Appeal in *Jones*, *Mulligan* and the case at bar did not discuss the issue of retroactivity, each Court applied the rule in *Wilson* retroactively. Even if, however, the *Wilson* ruling were not to be applied retroactively to the case at bar, the outcome would be the same in light of the District Court's ruling in this case. *See* Petitioner's Appendix, at A-2.

There is not "confusion and conflict" in the application of *Wilson* by the lower courts as the Petitioner asserts. Only two cases decided since *Wilson* rejecting the *Jones-Mulligan-Gates* reasoning were cited by the Petitioner in her brief, both district court decisions. One of these, *Hobson v. Wilson*, No. 76-1326 (D.C. D.C. Dec. 16, 1985), was a 42 U.S.C. §1985(3) case, and that court specifically distinguished its ruling from the decisions in *Jones*, *Mulligan* and *Gates*.

Miss. Code Ann. §15-1-35 (Supp. 1985) is the applicable statute of limitations to the case at bar and all §1983 claims in Mississippi because it "more specifically encompasses the sorts of actions which concerned Congress as it enacted the civil rights statutes." *Mulligan v. Hazard*, slip op. at 8.

I. THE COURT OF APPEALS DID NOT ERR IN ITS APPLICATION OF *WILSON V. GARCIA* IN CONCLUDING THAT ALL 42 U.S.C. §1983 ACTIONS IN MISSISSIPPI ARE GOVERNED BY THAT STATE'S ONE-YEAR LIMITATION FOR INTENTIONAL TORTS.

This Court in *Wilson v. Garcia* recognized that "conflict, confusion and uncertainty" existed "concerning the appropriate statute of limitations" applicable to 42 U.S.C. §1983 [hereinafter referred to as §1983] actions. 85 L.Ed.2d at 260. In an attempt to bring uniformity and certainty to this area, the Court concluded that §1983 claims are best characterized as "personal injury actions" for purposes of applying the particular statute of limitations in each state. 85 L.Ed.2d at 269. In reaching this conclusion, the Court looked to the "specific historical context" for the Reconstruction Civil Rights Acts, and found that "The atrocities that concerned Congress in 1871 plainly sounded in tort." 85 L.Ed.2d at 266-67.

In deciding *Wilson*, the Court was faced with three New Mexico statutes of limitations: a two-year statute contained in the New Mexico Tort Claims Act, a three-year statute for actions "for an injury to the person or reputation of any person" and a four-year "catch-all" statute. 85 L.Ed.2d at 258. The Court chose the three-year statute reasoning that "Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injuries than, for example, to claims for damages to property or breach of contract". 85 L.Ed.2d at 267.

The Court in *Wilson*, of course, was not faced with the choice between *two* personal injury statutes as is the case in the instant action. The Court in *Wilson* could have gone

on to further define what it meant by "personal injuries" in states such as Mississippi and others which have two or more statutes dealing with personal injuries.[1] Indeed, this was one of the criticisms of Justice O'Connor in her dissent to the *Wilson* decision.[2] The Court, however, chose to go no further than to hold only that in each state the statute of limitations for §1983 actions originating in that state must be one that governs "a general remedy for injuries to personal rights." 85 L.Ed.2d at 268.

While the Court did not directly address the question of which statute would be applied when the choice was between a statute governing intentional torts and one governing other kinds of torts, the reasoning it used in reaching its decision in *Wilson* was enough to convince the Eleventh, Sixth and Fifth Circuit Courts of Appeal that, when faced with that choice, a statute governing intentional torts was more analogous to §1983 actions than a statute dealing with negligence and strict liability.

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1. The following states have one-year statutes of limitations which govern certain intentional torts: Arizona (*Ariz. Rev. Stat.* §12-541); Arkansas (*Ark. Stat. Ann.* §37.201); California (*Cal. Civ. Proc.* §340-2); Colorado (*Colo. Rev. Stat.* §13-80-102); Kansas (*Kan. Stat.* §60-514); Maryland (*Md. Cts. & Jud. Proc. Code Ann.* §5-105); Mississippi (*Miss. Code Ann.* §15-1-35); Nebraska (*Neb. Rev. Stat.* §25-208); North Carolina (*N.C. Gen. Stat.* §1-54); Ohio (*Ohio Rev. Code Ann.* §2305.11); Oklahoma (*Okla. Stat. Ann.* §12-95); Utah (*Utah Code Ann.* §78-12-29); Wyoming (*Wyo. Stat.* §1-3-105[a][v]).

The following states have one-year statutes of limitations for all types of personal injuries: Kentucky (*Ken. Rev. Stat. Ann.* §413.140); Louisiana (*La. Civ. Code Ann.* Art. 3536); Tennessee (*Tenn. Code Ann.* §28-3-104);

2. "[T]here is no guarantee state law will obligingly supply a limitations period to match an abstract analogy that may have little relevance to the forum state's limitations scheme." 85 L.Ed.2d at 273 (O'Conner, J., dissenting).

In *Jones v. Preuit and Mauldin*, 763 F.2d 1250 (11th Cir. 1985), the first Circuit decision applying the rule set forth in *Wilson*, the court was required to choose an appropriate Alabama limitations statute for a §1983 action. Prior to *Wilson*, the applicable Alabama limitation statute in §1983 actions was a one-year "catch-all" statute which included negligence causes of action, but not intentional tort causes of action. *See Jones v. Preuit and Mauldin*, 586 F.Supp. 1563 (N.D. Ala. 1984), *rev'd*, 763 F.2d 1250 (11th Cir. 1985). After *Wilson*, however, the Eleventh Circuit chose to apply a six-year statute dealing with intentional torts over the one-year "catch-all" statute. In making that choice, the Eleventh Circuit recognized that "obviously . . . some §1983 claims will sound in trespass and others in trespass on the case." *Jones v. Preuit and Mauldin*, 763 F.2d 1250, 1255 (11th Cir. 1985). The court in *Jones* defined trespass as basically intentional acts and trespass on the case as basically non-intentional acts. The *Jones* court then turned to the *Wilson* case's reasoning to determine which of the two statutes applied:

> The appropriate characterization of §1983 personal injury claims must be determined by searching the legislative history of the statute and isolating the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators intended first and foremost to address. The Supreme Court in *Wilson* made such a determination in order to conclude that §1983 claims are personal injury claims rather than general statutory claims falling within a catch-all limitations statute. . . .

> . . .The paradigmatic personal injuries covered by the statute, those that motivated the Congress to take action, were acts of intentional and direct violence on the part of the Ku Klux Klan. 763 F.2d at 1255.

Based on the "historical context" of the enactment of the Reconstruction Civil Rights Acts, the Eleventh Circuit concluded that "on the basis of Congressional intent and [*Wilson v. Garcia*] . . . a §1983 claim should be characterized as a personal injury along the lines of trespass." 763 F.2d at 1256.

In *Mulligan v. Hazard*, No. 84-3555, slip op. (6th Cir. Nov. 26, 1985), the Sixth Circuit Court of Appeals was faced with the choice of applying a one-year statute dealing with certain intentional torts and a two-year statute for "bodily injury". The case involved a §1983 claim quite similar to the instant case. In *Mulligan*, the plaintiff, a university professor, alleged that the Ohio State University Board of Trustees unconstitutionally restricted her tenure rights by amending the university's tenure policy to provide for "campus-specific tenure" in place of the prior practice of "university-wide tenure." The Sixth Circuit held that the one-year Ohio statute governing certain intentional torts was the correct statute to apply to §1983 cases originating in Ohio.[3] While acknowledging that not all intentional torts were listed in the one-year statute, the Court, relying on the historical analysis of *Wilson*, concluded that:

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3. The Sixth Circuit applied a one-year statute of limitations, *Ohio Rev. Code* §2305.11, which was virtually identical to the Mississippi Code section applied by the Fifth Circuit in the instant case, *Miss. Code Ann.* §15-1-35 (Supp. 1985).

> The concern of Congress, thus, was with perpetrators of intentional tortious conduct. While both §§2305.10 and 2305.11 theoretically encompass intentional tort actions, §2305.11, which applies to actions involving assaults, batteries and the like, more specifically encompasses the sorts of actions which concerned congress as it enacted the civil rights statutes. Accordingly, we hold that the one-year limitations period contained in §2305.11 governs Mulligan's actions. *Mulligan v. Hazard*, slip op. at 8.

The Fifth Circuit Court of Appeals in the instant case was faced with the same choice as the Eleventh Circuit had in the *Jones* case and the Sixth Circuit had in the *Mulligan* case. Mississippi has two statutes of limitations which are applied to personal injury actions depending on the kind of tort involved. *Miss. Code Ann.* 15-1-35 (Supp. 1985) [hereinafter referred to as §15-1-35] provides a one-year limit on suits filed alleging certain intentional acts causing personal injury. *Miss. Code Ann.* §15-1-49 (Supp. 1985) [hereinafter referred to as §15-1-49], on the other hand, is a so-called "catch-all" statute which fixes a six-year limit on all suits filed which are not governed by any other specific limitation statute. Suits alleging negligence and strict liability, among others, are governed by this six-year statute.

The mere fact that certain intentional torts causing personal injury do not appear in the list of intentional torts does not mean the Mississippi legislature did not intend §15-1-35 to govern intentional torts causing personal injury. Both the United States District Court for the Northern District of Mississippi and the Mississippi Supreme Court have recognized this. *See Andrews v. G.A.B. Business Services, Inc.*, 443 F.Supp. 510 (N.D. Miss. 1977) (suit alleging

invasion of privacy barred by §15-1-35 although invasion of privacy not explicitly listed as an intentional tort in that code section); *Dennis v. Travelers Ins. Co.*, 234 So.2d 624, 626 (Miss. 1970) ("there can be no escape from the bar of the statute of limitations applicable to intentional torts by the mere refusal to style the cause brought in a recognized statutory category and thereby circumvent prohibition of the statute.").

The Petitioner's argument that §15-1-35 "is inapplicable to suits for personal injuries" (Petition of Petitioner at 17) is merely a semantical argument. *Nelson v. James*, 435 So.2d 1189 (Miss. 1983) dealt with the alleged *negligent* operation of a motor vehicle by the defendant and whether the six-year statute of limitations contained in §15-1-49 could be tolled when the final day of the six years fell on a Sunday. *Ford Motor Company v. Broadway*, 374 So.2d 207 (Miss. 1979) dealt with the applicable statute of limitations in a *products liability case*. *Bell v. Kansas City M & B Co.*, 68 Miss. 19 (1891) simply held that §15-1-35 was not designed to regulate suits against railroad companies for assaults since, at that time, a railroad company was not legally able to commit such an act.

Even if it were true that §15-1-35 applies only to the torts listed in that section, the outcome would be the same. The Fifth Circuit Court of Appeals in the case at bar did not consider the fact that not all intentional torts were explicitly listed in §15-1-35 to be significant in its decision. Rather, that court focused on "the state statute most analogous to §1983" by a consideration of "the dominant purpose of Congress in enacting §1983". *Gates v. Spinks*, 771 F.2d 916, 919 (5th Cir. 1985).

The fact remains that all three Circuit Courts of Appeal which have applied this Court's decision in *Wilson*–the Eleventh in *Jones*, the Fifth in the case at bar and the Sixth in *Mulligan*–applied the intentional tort statute of limitations rather than a residual or negligence-based statute. Each case used *Wilson*'s logic in reaching its decision. While it is true that the Court in *Wilson* did not further define "personal injury" statute of limitations, the district courts and courts of appeal are capable of determining each state's personal injury statute in conformity with the ruling in *Wilson*, and, as here, determining which of the state's personal injury statutes is applicable.

II. THE SELECTION OF MISSISSIPPI'S ONE-YEAR LIMITATION PERIOD FOR ALL §1983 CLAIMS IS NOT INCONSISTENT WITH THE OVERRIDING FEDERAL INTERESTS EMBODIED IN THE CIVIL RIGHTS ACT AND DOES NOT UNDULLY BURDEN THE ASSERTION OF FEDERAL CONSTITUTIONAL RIGHTS.

In support of her argument that a one-year statute of limitations for §1983 cases is inherently improper, Petitioner cites four cases. Two of these, *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978) and *Van Horn v. Lukhard*, 392 F.Supp. 384 (D.C. Va. 1975) are Virginia-based cases in which the Fourth Circuit Court of Appeals and the Virginia District Court, respectfully, refused to apply a one-year statute of limitations enacted by Virginia's legislature specifically for §1983 claims. *Shouse v. Pierce County*, 559 F.2d 1142 (9th Cir. 1977), a third case cited by the Petitioner, is clearly too short a period for filing §1983 claims: 30 days. *Burnett v. Grattan*, 82 L.Ed. 36 (1984) dealt with a six-month statute of limitations and the Supreme Court found that not to be long enough. Aside from the two Virginia cases, however, the Petitioner has cited no authority that one year is not a sufficient time in which to file a §1983 claim.

Three factors suggest that one year is a quite sufficient period within which to file a §1983 claim.

First, the only time limitation statute included in the Reconstruction Civil Rights Acts is 42 U.S.C. §1986 [hereinafter referred to as §1986].[4] The one-year limitation provided for in that section, while not binding in §1983 actions, could certainly be considered persuasive insofar as setting a minimum time limit for §1983 actions, since, logically, the time required to prepare for the filing of a suit under §1986 would seem to be at least as great for that required for filing most §1983 suits. If the Court is trying to determine the minimum time limit which will not constitute a burden on the assertion of federal constitutional rights, it seems reasonable to conclude that the one-year limit of §1986 is what the Congress in 1871 would have required had it chosen to speak to the issue.

Secondly, a brief review of the facts in the case at bar demonstrates that the one-year statute did not work any hardship on the Petitioner in this case. On April 3, 1981, the Petitioner was given notice pursuant to state statute[5]

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4. 42 U.S.C. §1986 provides: Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case. . . . But no such action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

5. *Miss. Code Ann.* §37-9-105 (Supp. 1985).

that her principal had not recommended her for reemployment for the 1981-82 school year. In accordance with the Mississippi Employment Procedures Act,[6] the Petitioner requested a hearing, and the School District, through its Board of Trustees, after the hearing, on September 3, 1981, approved, upheld and affirmed the initial administrative recommendation not to reemploy the Petitioner. The Petitioner then appealed the Board's decision to the Forrest County, Mississippi, Chancery Court, perfecting the appeal on September 3, 1981, the very same day the Board of Trustees made its decision. The Chancery Court, on May 28, 1982, reversed the decision of the Board of Trustees, but on December 12, 1984, the Mississippi Supreme Court reversed the Chancery Court decision and reinstated the original September 3, 1981, decision of the School Board. Meanwhile, the Petitioner filed this § 1983 suit on December 1, 1982, after the ruling of the Chancery Court in her favor, but two years prior to the decision of the Mississippi Supreme Court reinstating the original School Board decision. The Petitioner had no difficulty making a request to the School Board for an administrative hearing within five days of her receipt of the notice of non-reemployment. Once the Chancery Court reversed the School Board and ruled in her favor, she had no difficulty filing the present action. But the Petitioner was not required to exhaust her administrative remedies before filing this suit.[7] She just waited

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6. *Miss. Code Ann.* §37-9-109 (Supp. 1985).

7. *See, e.g., McNeese v. Board of Education*, 373 U.S. 668, 10 L.Ed.2d 622, 83 S.Ct. 1433 (1963); *Damico v. California*, 389 U.S. 416, 19 L.Ed.2d 647, 88 S.Ct. 526 (1967); *Rainey v. Jackson State College*, 435 F.2d 1031 (5th Cir. 1970).

until she had a favorable decision in the administrative line of review before filing suit. In so doing, under the application of *Wilson* by the Fifth Circuit, she simply waited too late.

Finally, the Sixth Circuit in *Mulligan v. Hazard*, No. 84-3555, slip. op. (6th Cir. Nov. 26, 1985) had no hesitancy applying a one-year Ohio statute of limitations to that plaintiff's § 1983 claim.

What, then, is the minimum reasonable time limitation for filing § 1983 suits? Based on the analogous reasoning of § 1986, the Sixth Circuit's decision in *Mulligan*, and the facts of this case–which is certainly not atypical of employment discrimination-based § 1983 cases–one year is reasonable.

III. THE COURT OF APPEALS DID NOT ERR IN RETROACTIVELY APPLYING *WILSON V. GARCIA* TO BAR THE PETITIONER'S CLAIM, BUT EVEN IF *WILSON V. GARCIA* WERE NOT APPLIED RETROACTIVELY THE PETITIONER'S CLAIM WOULD BE BARRED.

There is no question that *Wilson v. Garcia* changed the law in Mississippi with regard to the applicable statute of limitations in § 1983 actions, but the Respondents differ significantly with the Petitioner as to the effect of a prospective versus retroactive application of *Wilson* in the instant case.

Prior to *Wilson*, § 1983 suits originating in Mississippi in which a plaintiff alleged a discriminatory termination from employment, as is the case here, were governed by the one-year limitation of *Miss. Code Ann.* § 15-1-29 (Supp. 1985), and it was on this basis that the District Court originally granted summary judgment in the Respondent's favor.

See Petitioner's Appendix at A-2. The Fifth Circuit Court of Appeals recognized this in its opinion in the instant case, calling this line of cases "binding circuit authority",[8] strongly implying that it would have affirmed the district court on the same basis as the district court had originally granted summary judgment but for *Wilson v. Garcia*.

The line of cases advanced by the Petitioner as being the law in Mississippi in §1983 cases where a statute of limitations question is involved was held inapplicable by the Fifth Circuit to cases involving alleged discriminatory termination from employment.[9]

Even if, therefore, *Wilson* should be applied prospectively, the result would be the same for the reasons stated in the district court's original opinion.

The fifth Circuit Court of Appeals did not err, however, in applying the *Wilson* decision retroactively since, as the Sixth Circuit Court of Appeals in *Mulligan* noted, the *Wilson* decision "implicitly mandates that its decision be applied retroactively," by retroactively applying the New Mexico statute governing personal injuries. *Mulligan v. Hazard*, slip op. at 7.

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8. 771 F.2d at 917.

9. *Morrell v. City of Picayune*, 690 F.2d 469 (5th Cir. 1981), is inapplicable to cases involving wrongful termination from employment since *Morrell* dealt with "physical abuse and injury." *Breland v. Board of Education of Perry County, Mississippi*, 729 F.2d 360 (5th Cir. 1984).

Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976), is inapplicable to the case at bar for two reasons. Like *Morrell*, it was a "police brutality" case. Additionally, the plaintiff in *Shaw* sued both the police officer and his bonding company, making the suit, under Mississippi law at that time, a suit for breach of contract rather than a tort.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Moran M. Pope, III, Counsel for Respondents, do hereby certify that I have served a copy of the foregoing Response to Petition for Writ of Certiorari, by mailing a copy of the same by United States Mail, postage fully prepaid, to Hon. Jack D. Novik and Hon. Burt Neuborne, American Civil Liberties Union Foundation, 132 West 43rd Street, New York, New York, 10036, Counsel for Petitioner.

This, the 17th day of February, A.D., 1986.

Moran M. Pope III

Moran M. Pope, III